

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1765

STANLEY JULES JOHNSON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

STANLEY JULES JOHNSON,
Petitioner,
versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

TO THE HONORABLE CHIEF JUSTICE WARREN
BURGER, AND TO THE HONORABLE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Your petitioner, Stanley Jules Johnson, hereafter sometimes referred to as "Defendant" or "Appellant" respectfully petitions this Honorable Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit to review and reverse a judgment of conviction and a sentence for a violation of 18 U.S.C. 2113 (a), (e) and 18 U.S.C. 2.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated April 11, 1977, is published and appears herein at Appendix A. The District Court wrote no opinion.

JURISDICTION

Jurisdiction is conferred on this Court by Section 1254 (1) of Title 28, U.S.C.

The judgment of the Court of Appeals for the Fifth Circuit was rendered on April 11, 1977. It is noted the thirty (30) days time period under Rule 22 has expired, however, *Heflin versus United States*, 358 U.S. 415 is cited for authorities for filing after May 11, 1977.

STATEMENT OF THE CASE

A. Summary Of The Indictment.

The Grand Jury in a two count indictment, charged the defendant and Leonard Washington with armed bank robbery and avoiding apprehension forced Irvin M. Brown to accompany them and killed him.

The Appellant, Stanley Jules Johnson, hereinafter referred to as Petitioner, was indicted in a two count indictment on November 20, 1975 in violation of Title 18, Section 2113 (a) (d) (3) and Section 2 of the United States Code.

The Petitioner was arraigned and pled not guilty, and after pre-trial motions, this cause was brought to trial on February 2, 1976.

Prior to opening statement, Petitioner's counsel orally moved to adopt all motions and objections made by Co-Defendant's Counsel (Tr. 35).

On Friday morning, February 6, 1976, after instructions by the Court, the jury retired to deliberate, the jury returned on Friday evening of February 6, 1976, with a verdict of guilty as charged on both counts of the indictment against the Petitioner.

Post trial motions were timely filed by defense and denied by Court.

A pre-sentence investigation was ordered by the Court, and on March 3, 1976, the Petitioner was sentenced to 99 years imprisonment.

On April 11, 1977 the United States Court of Appeals for the Fifth Circuit, No. 76-1750 affirmed the conviction. Chief Judge Brown, Judges Ainsworth and Jameson.

ISSUES

The Court erred in denying the Petitioner's effective cross-examination after prejudicial remarks by the Court in the presence of the jury.

The Court erred in denying the Petitioner's Motion to Suppress the Evidence of the Search Warrants (Government Exhibits 45 and 46).

The Court erred in refusing to charge the jury on the Petitioner's theory of the case.

The Court Erred In Denying The Petitioner's Effective Cross Examination After Pre-judicial Remarks By The Court In The Presence Of The Jury.

During the trial the Government Offered Special Agent Max Marr as an expert witness in lifting latent fingerprints and dusting for latent fingerprints, the defense objected to his qualifications as follows:

"MR. HARRIS:

I realize that, but my questions were directed to lifting as well as analyzing, and the witness had indicated that he is totally unfamiliar with these various texts that are available and these articles that are available, and for that reason we would argue against the qualifications as an expert.

THE COURT:

He's totally acceptable to the Court as an expert. I say that he has had more experience than any F.B.I. agent that's worth his salt.

He's had more experience than all of those nutty professors that you have talked about.

He's had more experience than any police officer who's worth his salt.

It's done by the school of hard knocks, is where you learn to dust something and lift fingerprints, and not by some professor sitting in some university who doesn't know his neck from third base."

By these remarks, the Petitioner, was denied effective cross examination of the agent's qualification by the Court.

The Government called twenty-eight (28) witnesses of which five (5) were expert witnesses. The defendant-appellant called one (1) expert witness. The Government's five (5) expert witnesses were from the "school of hard knocks" and the Petitioner's only expert could have been called one of those "nutty professors".

The strongest part of the Government's case, was the palm print, which was part of the testimony offered by the Government experts.

It is well known, as a matter of judicial notice, that juries are highly sensitive to comments by the trial judge. Thus, a trial judge must seek total neutrality and complete circumspection in the eyes and minds of the jury. *Bursten vs. United States*, 395 F. 2d 976, 982-983 (5th Cir. 1968).

In *United States vs. Williams*, 434 F. 2d 250 (5th Cir. 1971) the Trial Judge, in his general instructions on the law, remarked favorably on the duties of the Secret Service in guarding the currency of the United States. The Fifth Circuit, in admonishing the behavior of the Trial Judge, stated:

"... The jury's fact-finding duties may not be trespassed upon by a judge's comments, directly or impliedly, which point to one witness or set of witnesses as the more likely to be telling the truth. However, innocently

they were made, we find the quoted comments objectionable on this ground. They had the effect of bringing vividly and favorably to the minds of the jurors the testimony of the Secret Service witnesses and the important work they perform in protecting the integrity of the currency. We review these remarks as being out of place . . . and as exceeding our concept of appropriate and fair comment from the bench . . ." *United States vs. Williams*, 447 F.2d at 902.

The Sixth Amendment right of an accused to confront and cross examine the witnesses against him is a "fundamental right" that corresponds to the right to effective assistance of counsel.

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. *Alford vs. United States*, 282 U.S. 687, at 688-689, 51 S. Ct. 218, 75 L. Ed. 624. *Pointer vs. State of Texas*, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, *Brookart vs. Janis*, 384 U. S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314,

Smith vs. State of Illinois, 390 U. S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956.

The Court Erred In Denying The Petitioner's Motion To Suppress The Evidence Of The Search Warrants (Government Exhibits 45 and 46)

The record shows that the search warrant involved in the instant case was issued by Judge Wallace LeBruns of the 24th Judicial District Court on March 19, 1975. (Tr. 526).

The defense attorney objected to the use of evidence seized by way of the search warrant therein. The Court found that the search warrant was valid. (Tr. 534).

The record also will reflect that the warrants were issued on the basis of the affiant's conclusions which were not corroborated by independent surveillance. The information in the affidavit supporting the search warrant was obtained from so called informers who were not shown to be reliable nor were they alleged to be reliable.

In the case of *Spinelli vs. United States*, 393 U.S. 410 (1969):

"The Court held that the affidavit failed to establish probable cause because it did not state facts enabling the magistrate to determine that the informer was telling the truth and because the corroboration of the informer's story by other parts of the affidavit was inade-

quate to compensate for the absence of such facts."

The *Spinelli* court reflected a more detailed affidavit which contained both an informant's tip and information independently obtained by the police about the suspect's criminal reputation and his allegedly suspicious movements.

There is clear authority to the proposition that an affidavit containing police suspicion of illegal activity without any supporting detail is clearly insufficient for probable cause, for it puts the magistrate in the position of accepting the police's conclusions rather than making his own evaluation of facts.

See *Aguilar vs. Texas*, 378 U.S. 108, 114 (1964). If the only reason the magistrate has to accept an affidavit establishing probable cause is a police submission of an informant's story, however detailed, a similar abdication of his authority occurs. For evidence of crime, he is relying on hearsay, the police report of the informer's allegations.

See *Harris vs. United States*, 403 U.S. 573 (1971), wherein the Court stated that the detailed tip was apparently based on an informer's personal observation and was therefore reliable.

In this instance, no such facts existed.

The Court Erred In Refusing To Charge The Jury On The Petitioner's Theory Of The Case

Perhaps the most important instruction which must be tendered in each and every criminal case is the

defendant's "position" instruction or his "theory of the case." He is entitled to have the jury consider any theory of defense which is supported by Law, see *United States vs. Cullen*, 454 F.2d 386, 390 (7th Cir., 1971), and which has some foundation in the evidence, however tenuous. *United States vs. Vole*, 435 F. 2d 774, 776 (7th Cir., 1971); *United States vs. Grimes*, 413 F. 2d 1376, 1378 (7th Cir., 1969); *Turner vs. State*, State No. 227, June 4, 1974. See also, *United States vs. Blane*, 375 F. 2d 249, 252 (6th Cir., 1967).

The trial judge may not weigh the evidence supporting a theory of the case instruction, and if he declines to charge on the defendant's theory of the case, he in effect directs a verdict on that issue against the defendant.

"Even if the evidence to support the defense was "fragile" . . . or "weak, insufficient, inconsistent, or of doubtful creditability," . . . it was error to refuse to give the jury the substance of Musgrave's requested instruction concerning good faith reliance on the appraisals he submitted to the Association." [Citations and footnotes omitted]. *United States vs. Musgrave*, 444 F. 2d 755, 765 (5th Cir. 1971).

In considering the propriety of the denial of a favorable defense instruction on the ground that the evidence was insufficient to require it, an appellate court should view the evidence most favorably to the defendant. *Richardson vs. United States*, 403 F. 2d 574, 575 (D.C. Cir. 1968).

Where special facts present an evidentiary theory which, if believed, would defeat the factual theory of

the prosecution, a theory of the case instruction must be given provided it is tendered. *United States vs. Leach*, 427 F. 2d 1107, 1113 (1st Cir. 1970).

The defense theory was a plausible one in the circumstances, and had the jury accepted it, which it could have properly done, the Government's case would necessarily have failed, and this is the absence of concrete evidence and testimony request of the aforementioned charge. It is recognized that a party in a criminal case, is entitled to a specific instruction on his theory of the case if there is evidence to support it and a proper request for such an instruction is made.

The Defendant's Theory of the case was contained in Defense Jury Charges #VIII and IX:

In the case of *Perez vs. United States*, 297 F. 2d 12 (1961) at 16, (5th Circuit 1961).

"It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in evidence. *Tatum v. United States*, 190 F. 2d 612 (D.C. Cir. 1951). A charge is erroneous which ignores a claimed defense with such a foundation. *Hyde v. United States*, 15 F. 2d 816 (4th Cir. 1926). The charge to which he is entitled, upon proper request, in such circumstances is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of defense. Cf. *United States v. Indiana Trailer Corp.*, 226 F. 2d 595, 598 (7th Cir. 1955); *Apel v. United States*, 247 F. 2d 277 (8th Cir. 1951), and

one which does not unduly emphasize the theory of the prosecution, thereby deemphasizing proportionally the defendant's theory." It is also fundamental to our jurisprudence that instructions to the jury must be consistent with each other, and not misleading to the jurors. *Smith v. United States*, 230 F. 2d 935 (6th Cir. 1956). The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. *Smith v. United States*, *supra*. Most important, is no condition of proof is it permissible to leave with the jury the idea that it has become the duty of the defendant to establish his innocence to obtain an acquittal. See e.g., *Ezzard v. United States*, 7 F. 2d 808 (8th Cir. 1925). The refusal of the trial judge to instruct the jury as requested was in violation of each of these principles.

The case of *Strauss vs. United States*, 376 F. 2d 416, at 419, (5th Cir. 1967) reiterated the doctrine that the defendant in a criminal case is entitled to have presented instructions relating to any foundation in the evidence regardless as to how tenuous:

"We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. The defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is a fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense,

he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible. *Bryan v. United States*, (5th Cir., 1967), 373 F. 2d 403. The judge must, therefore, be cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe. We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense. In *Tatum v. United States*, 1950, (88 U.S. App. D.C.) Circuit said:

"We do not intend to characterize the case for the defense as whether strong or weak. That is unnecessary, for 'in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though testimony in support of the defense in his own."

Levine vs. United States, 1958, 104 U.S. App. D.C. 281, 261 F. 2d 747; *Perez vs. United States*, *supra*, *Smith vs. United States*, (6th Cir. 1956), 230 F. 2d 935; *United States vs. Indian Trailer Corp.*, (7th Cir. 1955), 226 F. 2d 595. See *Merrill vs. United States*, (5th Cir. 1964), 338 F. 2d 763; *Koontz vs. United States*, (5th Cir. 1960), 277 F. 2d 53.

All evidence of which varied conclusion can be reached must be considered as establishing a possible defense and the defendant is entitled to such charge. The case of *United States vs. Grimes*, 413 F. 2d 1376, at 1178 (7th Cir. 1969) states:

"We start with the proposition that the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however, tenuous. *Tatum v. United States*, 88 (U.S. App. D.C.) 386, 190 F. 2d 612, 617 (D.C. Cir. 1951); *United States v. Phillips*, 217 F. 2d 435, 442-443 (7th Cir. 1954). There is no question that the evidence in the present case raised a jury question as to the cause of the fight between Reid and the guards and Grimes' motivation in intervening in the struggle. The issue then becomes whether federal law provides a defense to a prosecution under Section 111 for the use of reasonable force to defend another from an unprovoked assault by a federal officer."

Once this reason theory has been established either by direct evidence of the defense or through the insufficiency of the evidence produced by the State. It is mandatory in equity and justice that the defense charge be given. All are presumed to be innocent until proven guilty and the determination of guilt is strictly a jury function.

CONCLUSION

For the foregoing reasons, we pray for certiorari, reversal and dismissal and such other and further relief in the premises as this Honorable Court may deem just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition has been mailed, postage prepaid, by U.S. Mail, to the Solicitor General of the United States, Department of Justice, Washington, D.C., and that a copy has been mailed, postage prepaid, by U.S. Mail, to the United States Attorney for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, this ____ day of June, 1977.

ARTHUR L. HARRIS, SR.

APPENDIX

UNITED STATES of America,
 Plaintiff-Appellee,

v.

Leonard WASHINGTON and Stanley Jules Johnson,
 Defendants-Appellants.

No. 76-1750.

United States Court of Appeals,
 Fifth Circuit.

April 11, 1977.

Appeals from the United States District Court for
 the Eastern District of Louisiana.

Before BROWN, Chief Judge, AINSWORTH, Circuit
 Judge, and JAMESON*, District Judge.

JAMESON, District Judge:

Appellants, Stanley Jules Johnson and Leonard Washington, were convicted following a jury trial, on one count of armed bank robbery and assault, in violation of 18 U.S.C. §§ 2, 2113(a), and 2113(d), and on one count of kidnapping and murder incident to bank robbery, in violation of 18 U.S.C. § 2113(e). Each appellant was sentenced to 99 years imprisonment. We affirm.

Facts

At 11:35 A.M. on October 31, 1974, three black men armed with handguns entered the Bank of St. Charles

* Senior District Judge of the District of Montana, sitting by designation.

in Boutte, Louisiana. After forcing the bank employees and a customer into the vault, the men robbed the bank of \$21,982.75, and left the scene in a 1973 Mercury Comet (white with a brown top), which had been parked in front of the bank. Judy Gibbs, a witness who was parked in front of the bank, saw three black men leave the bank, get into the Mercury Comet, back out "real fast" and head west on Highway 90.

At about noon Joyce Bernard, who had been driving west on Highway 90, turned onto Bayou Gauche Road where she saw two cars in the righthand lane (her lane) of traffic — a late model two-toned compact car and a larger late model white car. Two black men stood between the cars conversing. One of them entered the larger car, drove past the compact, made a U-turn, and stopped next to the compact. The other man, who was wearing a red bandana around his throat, a "multiple-colored flannelette shirt", and a "little hat", squatted down behind the trunk of the compact as if he was "unlocking the trunk or fixing a flat". Both men then drove off in the larger car.¹

Susan Lewis was also driving on Bayou Gauche Road at about noon. As she stopped behind a two-toned compact car parked in the right lane in order to let a truck pass from the opposite direction, she noticed blood dripping from the trunk of the car. Upon the arrival of police, the car's trunk was pried open, revealing the body of Irwin Brown, who had died of a gunshot wound in the head. The car was identified as a 1973 Mercury Comet belonging to Brown. Recovered

¹ It was stipulated that appellant Johnson owned a white 1974 Chevrolet Malibu Super Sport sedan.

from the roadside near the car were an orange hardhat, a red bandana, a glove, a blue workshirt, and a button identified as coming from the shirt. An examination of the car revealed a latent palm print on the right-front door handle, a spent .45 caliber shell casing, and the .45 caliber bullet which killed Brown.

The evidence disclosed that Irwin Brown, a customs broker and international freight forwarder in New Orleans, had a parking contract with the Holiday Inn on Royal Street and always parked his car, a white 1973 Mercury Comet with a brown top, there. On the morning of October 31, 1974, Brown followed his daily routine of dropping his son off at school and proceeding to work, but Brown never appeared for work.

Emile Carmouche, an employee of the Holiday Inn, testified that between 7:30 and 8:00 A.M. on October 31 he noticed two men, one wearing a red bandana on his head, enter the Holiday Inn from Exchange Alley and walk up the stairwell leading to the parking lot. Carmouche identified one of the men as appellant Washington, although he could not be "sure beyond a reasonable doubt".

Employees of the bank identified one of the robbers as wearing a "bluish-gray shirt" and another as wearing a "red scarf", an orange hardhat, and a flannelette shirt, black with red stripes. The articles of clothing found near the car on Bayou Gauche Road were identified by the employees as similar to those worn by the robbers. Two of the employees, Myra Fields and Mona Scott, testified that they had been shown photo spreads by the F.B.I. following the

robbery and had identified the picture of Johnson as being similar to one of the men involved. Mrs. Fields testified that, although she was not positive, Johnson "could be the person that had come to my window". Mrs. Scott identified Johnson in court as one of the robbers and testified that she was "about ninety per cent sure" of her identification. A third employee, Gilda Rachael, identified Johnson as "almost definitely" being one of the robbers, and testified that she had previously identified Johnson at a police lineup on May 20, 1975.

Althea Tolliver, a friend of Johnson and Washington, was called as a witness by the Government. Tolliver, on October 31, 1974, was awaiting trial on charges of armed robbery. She agreed with a Government detective to assist in this case in return for his assistance in the disposition of the charges against her. Tolliver testified that upon her release on bail, she met Johnson, who told her that he "knew just what went down" at the bank robbery. Johnson said that one of the women at the bank had on a blue dress and that he knew one of the black women who worked there but wasn't worried. He told Tolliver that her "pistol sure came in handy that day".² When Tolliver asked him for some money, Johnson replied: "Well, I don't have any right now. If you would have come to me a couple of weeks ago, I had a fist full of fifties"

Tolliver testified that she later met Washington. Upon being asked about the robbery, he said: "Well, I

² Tolliver testified that she had stolen a .45 caliber automatic pistol from J. Dudley Bruton, one of her prostitution clients, and had given it to Washington. Washington later told her that he had sold the gun to Johnson.

did it [but] I didn't get my share of the money". When asked about the guns used in the robbery, Washington replied: "I got a prettier .38 than your .45". Tolliver further testified that the hardhat was similar to one owned by Washington and that the workshirt was similar to one owned by Johnson.

A .45 caliber colt automatic pistol was received in evidence as Exhibit 17. Testimony revealed that the gun had been purchased from Gretna Gun Works, Inc. by Charles Strickland, who sold it to George Evans, who in turn sold it to J. Bruton. As noted *supra*, Tolliver testified that she stole the gun from Bruton and gave it to Washington. She identified Exhibit 17 as similar to the gun she stole from Bruton. A firearms expert testified that the shell casing found in the trunk of the Mercury Comet had been fired from that pistol "to the exclusion of all other weapons in existence". He also testified that the slug recovered from the trunk could have been fired from the gun.³

A fingerprint expert testified that a latent palm print found on the right front door handle of Brown's Comet was definitely the palm print of Stanley Johnson. Records of South Central Bell Telephone Company showed that at 2:35 P.M. on October 31, 1974, Johnson made a person-to-person phone call from a phone booth in Luling, Louisiana, to his home in Marrero, Louisiana. The phone booth was three miles from Boutte on River Road, which connects Boutte with New Orleans.

³ The expert also testified that two .45 cartridges given to the F.B.I. by Bruton had been inserted and extracted from Exhibit 17. He testified that these cartridges and the spent casing found in the Comet's trunk had been inserted in the same gun.

Washington did not take the stand or call any witnesses. Johnson called several witnesses who testified that after 3:00 P.M. on the afternoon of October 31, 1974, Johnson had attended a football game and had helped a friend clean graves. Johnson himself testified about his activities on the afternoon of October 31, but could not recall what he had done that morning. He denied participating in the robbery of the Bank of St. Charles, denied making any statements to Althea Tolliver, and denied owning a .45 automatic. Johnson further testified that he didn't know how his palm print got on Brown's car.

Comments by Court

Both appellants argue that the court erred in remarks concerning the acceptability of a proffered Government expert in lifting latent fingerprints. In accepting the expert over defense counsel's objection that the witness was unfamiliar with leading texts and articles on the lifting of latent prints and was not an expert in the field of fingerprint analysis, the court stated:

"He's totally acceptable to the Court as an expert.

"I say that he has had more experience than any F.B.I. agent that's worth his salt.

"He's had more experience than any police officer who's worth his salt.

"He's had more experience than all of those nutty professors that you have talked about.

"It's done by the school of hard knocks, is where you learn to dust something and lift fingerprints, and not by some professor sit-

ting in some university who doesn't know his neck from third base."

Johnson contends that these remarks denied him effective cross-examination of the expert's qualifications. Both appellants contend that the court's statement adversely affected the credibility of Johnson's expert witness, Dr. Elder, a psychologist and professor, who testified about the possibility of error in photographic identifications. Appellants claim that the court violated its duty to remain neutral and improperly trespassed on the jury's fact-finding duties. See *United States v. Williams*, 447 F.2d 894 (5 Cir. 1971).

While the remarks were unfortunate, viewing the record as a whole they do not constitute reversible error. First, they took but a few moments of a five day trial, concerned a procedural matter, and did not reflect on appellants' guilt or innocence. See *United States v. James*, 510 F.2d 546, 550 (5 Cir. 1975), cert. denied 423 U.S. 855, 96 S.Ct. 105, 46 L.Ed.2d 81 (1976). Second, the comments were made long before appellants' expert took the stand, and were not directed towards him.⁴

4 Moreover, immediately following the comments, the court admonished the jury:

"I want the Jury to understand that the Court's not vouching for the qualifications of this witness, for his testimony, or anything. I accept him as an expert.

"I accept him on the basis of his expertise, of his training, of his having done the thing over a period of thirteen years.

"I think he's certainly capable of examining, having been an expert in the field.

"Now, it's up to the Jury to give the weight that their — that they are going to give to his testimony, whether they believe it or not. I'm not vouching for him."

Furthermore, the court in its charge instructed the jury that they were the sole judges of the facts and were not to be influenced by the court's comments during trial.

Comments by Witness

The Government's first witness was Sandra Brown, widow of the murder victim. Following her testimony, defense counsel asked that Mrs. Brown remain under subpoena and subject to the court's sequestration ruling. The Government objected, arguing that the defense could have asked anything they wanted of Mrs. Brown while she was on the stand, and the following colloquy ensued:

"THE COURT: All right.

"Mrs. Brown, you may go home if you wish, but you will remain under subpoena so that you can come back.

"THE WITNESS: Why can't I sit in here?

"THE COURT: You can't sit in the courtroom.

"THE WITNESS: They are doing that on purpose.

"THE COURT: There's a possibility that you will be recalled as a witness, therefore, you can't sit in the courtroom.

"THE WITNESS: They are doing that on purpose.

"THE COURT: Now, ma'am, that's not for you and me to say, I don't know, so —

"THE WITNESS: That's not right.

"THE COURT: All right. But, the circumstances are that you must stay out of the courtroom now.

"THE WITNESS: It's not fair.

"THE COURT: Well, you must stay out of the courtroom."

Defense counsel moved for a mistrial, which the court denied, stating: "I don't think that her outburst amounted to that much". Appellant Washington contends that the court erred in denying his motion for mistrial on the ground that Mrs. Brown's remarks prejudiced the jury against the defense at the outset of the trial. He argues that the Government violated its duty of fairness in the prosecution of the case by making the objection which prompted the outburst. Washington contends that the court, *sua sponte*, should have taken steps to eliminate or cushion the effect of the remarks on the jury.

We disagree. This dialogue occupied only a moment of a lengthy trial and concerned a procedural issue. See *United States v. James*, *supra*. The witness's remarks were unsolicited by the Government. Any effect this incident may have had on the ultimate verdicts was minimal. Neither defense counsel requested any cautionary instructions. The court bears no duty, *sua sponte*, to give such instructions. We conclude that Washington was not substantially prejudiced by the unsolicited remarks of the witness.

Suppression of Evidence

Johnson testified on cross-examination that he had never owned a .45 caliber pistol and had never kept any ammunition or holster in his house. Over defense objection, the Government rebutted Johnson's

testimony by introducing a shoulder holster and .45 caliber bullet seized on May 19, 1975, from Johnson's bedroom pursuant to a search warrant. Johnson contends that the evidence seized in the search should have been suppressed and not used for impeachment because the affidavit made in support of the search warrant⁵ did not establish probable cause. Relying on *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), Johnson argues that the affidavit did not state sufficient facts to establish the reliability of the informant.

The affidavit was made by Detective Mitchell of the Jefferson Parish Sheriff's office. In addition to stating facts about other crimes in which Johnson was believed to be involved, Mitchell set forth in detail a conversation on April 15, 1975, between F.B.I. Agent Beinner, who was in charge of the investigation of this case, and an informant Beinner knew to be "reliable". The informant told Beinner that the informant was standing on a street corner on November 1, 1974, when Johnson and Washington drove up. Johnson displayed a .45 caliber pistol and told the informant that it had been used in the commission of an armed robbery of a bank near Hahnville, Louisiana. Johnson said that during the robbery, they had to place a man in the trunk of the car. While Johnson was telling the informant about the robbery, he suddenly remembered that he had left a blue shirt marked "Loop Uniform" on the inside at the scene of the abandoned getaway car and was afraid the shirt might be traced to him. Washington then became upset and advised Johnson to leave. Beinner cor-

⁵ Two search warrants were obtained, the other pursuant to an investigation in an unrelated murder case.

roborated the informant's information with facts discovered during the F.B.I. investigation of the armed robbery of the Bank of St. Charles and the murder of Irwin Brown. Affiant stated that these facts "were not publicized and were known only to investigators and the perpetrator".

We conclude that the affidavit alleged facts sufficient to meet the "substantial basis" test of *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) and *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). In *Jones*, the Court stated that "[a]n affidavit is not to be deemed insufficient" because it sets out observations by someone other than the affiant, "so long as a substantial basis for crediting the hearsay is presented". 362 U.S. at 269, 80 S.Ct. at 735. The Court continued:

"[W]e have held that [an officer] may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327." 362 U.S. at 269, 80 S.Ct. at 735.

The Court found a "substantial basis" for crediting the hearsay in the search warrant affidavit because the informant had previously given accurate information, his story was corroborated by "other sources", and the defendant was known to the police as a user of narcotics.

United States v. Harris concerned the sufficiency of an affidavit for a search warrant based on the hearsay statements of an unnamed informant whom the affidavit stated was a "prudent person", and on the affiant's knowledge of the defendant's reputation as a "trafficker of nontaxpaid distilled spirits". In finding probable cause for the issuance of a warrant based on the affidavit, the Court reviewed its holding in *Jones, supra*, and stated that "Aguilar cannot be read as questioning the 'substantial basis' approach of *Jones*". 403 U.S. at 581, 91 S.Ct. at 2081. The Court found that the affidavit, like the one in *Jones*, "contained a substantial basis for crediting the hearsay" because both affidavits purported "to relate the personal observations of the informant" and recited "prior events within the affiant's own knowledge" — factors "clearly distinguish[ing] *Spinelli*". It was held that an averment that the informant had previously given "correct information" was not necessary. The Court declined to follow *Spinelli* to the extent that it precluded reliance by a policeman on his knowledge of a suspect's reputation in assessing the reliability of the informant's tip. 403 U.S. at 583, 91 S.Ct. 2075.

The affidavit here provided a substantial basis for crediting the hearsay.⁶ We hold that the search of Johnson's residence was made pursuant to a valid warrant and that the evidence obtained thereby was

⁶ It may be noted also that the evidence relating to the search was introduced for impeachment purposes. In a different context the Court has recognized that evidence inadmissible in the prosecution's case in chief under the exclusionary rule may be used for impeachment purposes to attack the credibility of the defendant's trial testimony. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

properly admitted for purposes of impeaching Johnson's testimony.

Jury Instructions

Appellant Johnson contends that the court erred in refusing to instruct the jury on what he terms "the defendant's theory of the case", contained in his requested instructions VIII and IX. Requested instruction VIII reads:

"In order to convict the accused, each individual juror should arrive at the conclusion that the defendant has been proven guilty beyond a reasonable doubt, that is, each individual juror, 'and each juror' having in view the oath he had taken and his duty and responsibility thereunder should have his own mind convinced beyond a reasonable doubt upon all the evidence before he should consent to a verdict of guilty."

This requested instruction was fully covered by the court's charge that the Government bore the duty of proving each element of its case beyond a reasonable doubt and that each juror must independently reach his own conclusion. See *United States v. Garcia*, 531 F.2d 1303, 1307 (5 Cir. 1976). Proposed instruction VIII was properly refused.

The second paragraph of Johnson's proposed instruction IX reads:

"Further the defense theory of the case on the palm print is that the evidence produced

did not establish how long the latent prints had been on the car, or who the other prints on the car belonged to, therefore the evidence on the palm print is inconclusive. I charge you where any element of prosecution's rests on circumstantial evidence, such evidence may be a basis for conviction only if it shows complete inconsistency with innocence and excludes every reasonable hypothesis except that of guilt of the accused. This simply means that the prosecution must prove each and every link in its chain of evidence beyond a reasonable doubt, and if any one link in the chain has not been proved beyond such reasonable doubt, a verdict must be returned. In order to convict the defendant on circumstantial evidence, such evidence must be inconsistent with his innocence and fairly consistent with his guilt."

This instruction was also properly rejected. The first sentence is clearly a comment on the weight of the evidence. The remainder of the instruction deals with the "reasonable hypothesis" test. This court has consistently followed *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954) and held that such an instruction "is not required where there [are] adequate instructions on reasonable doubt". *United States v. Pipkins*, 528 F.2d 559, 564 (5 Cir. 1976), cert. denied, 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1191 (1976). The jury here was adequately instructed on reasonable doubt.

Sufficiency of the Evidence

Appellant Washington contends that the evidence is insufficient to support his conviction. He argues that Carmouche's identification testimony was so tentative as to raise only a suspicion that he could have been one of the robbers. Washington attacks the credibility of Althea Tolliver's testimony by reciting the evidence offered to impeach her.

Upon a review of the record and taking the evidence in the light most favorable to the Government, we conclude that there is sufficient evidence to sustain Washington's conviction. Tolliver testified that when asked about the bank robbery, Washington said "Well, I did it". In further conversation about the weapons used in the robbery, Washington stated that they were a .38 and "your [Tolliver's] .45". While there was evidence to impeach Tolliver's testimony, this evidence was argued at length by counsel and considered by the jury. The jury obviously believed Tolliver. Carmouche's identification of Washington as one of the two men who entered the Holiday Inn garage on the morning of October 31, 1974, while by no means positive, further implicated Washington. There was testimony that Washington owned an orange hardhat similar to that found near the murder victim's car. Although the evidence against Washington may not be overwhelming, we find it sufficient to establish Washington's guilt beyond a reasonable doubt.

Motion for New Trial

Washington moved for a new trial on grounds that (1) comments made by Johnson's attorney in closing

argument reflected on Washington's failure to testify, and (2) the Court should have severed the trials of the two defendants. Washington claims error in the court's denial of his motion.

During his argument to the jury, counsel for Johnson referred to facts to which his client had testified during the trial. Washington contends that these references by inference drew the jury's attention to Washington's failure to testify and deprived him of the right to remain silent, thereby falling within the prohibition of *De Luna v. United States*, 308 F.2d 140 (5 Cir. 1962).

We find no merit in this contention. *De Luna* is distinguishable. There counsel for one defendant repeatedly commented on the failure of the co-defendant to testify. Here Johnson merely summarized the facts to which his client testified. He made no reference to Washington's failure to testify. It is clear from the holding of this court in *United States v. Hedges*, 502 F.2d 586, 587 (5 Cir. 1974) that *De Luna* is inapplicable. The court there said: "A mere favorable comment upon the fact that one of several co-defendants testified does not involve the same potential for prejudice as an adverse comment by counsel upon the failure to testify of the other co-defendant. We decline to extend *De Luna* to cover the situation."

Washington concedes that the "court did, in its general charge to the jury, correctly state the law regarding the failure of an accused to testify in his own behalf". This charge was sufficient.

Washington contended for the first time in his motion for a new trial that his trial should have been severed to avoid "the cascading effect of the evidence introduced against Stanley Johnson". Since he did not either before or during the trial move for a severance, to prevail on this issue now, Washington must demonstrate actual prejudice resulting from the failure to sever his trial from that of his co-defendant. *Tillman v. United States*, 406 F.2d 930, 934-935 (5 Cir. 1969), vacated on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). Washington has failed in this burden. Washington and Johnson were properly joined since both were involved in both counts of the indictment. See F.R.Crim.P. 8(b). Washington does not claim that his co-defendant had an antagonistic defense, or that the jury was confused by the number of defendants or issues. See *United States v. Larson*, 526 F.2d 256, 260 (5 Cir. 1976), cert. denied, ____ U.S. ___, 97 S.Ct. 110, 50 L.Ed.2d 106. The law of this circuit is clear that "[a] defendant cannot claim prejudice from failure to sever merely because his likelihood of acquittal is not as great in a joint trial as in a separate trial". *United States v. Larson*, *supra* at 260.

Furthermore, the trial court properly instructed the jury on their duty to consider the guilt of each defendant separately. "[T]his instruction was given to the jury near the end of the judge's instructions, such that it cannot be argued that it did not make an impression on the jury." *United States v. Larson*, *supra* at 260. Washington has failed to demonstrate any actual prejudice. The trial court's denial of his motion for a new trial was clearly within its discretion.

Brady Material

Following trial, defense counsel learned that a five thousand dollar reward had been offered for information leading to the arrest and conviction of those responsible for the robbery of the Bank of St. Charles and the murder of Irwin Brown.⁷ Upon learning of the reward, appellants moved for a new trial, contending that the Government had a duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) to reveal the reward offer to the defense and argued that the Government's failure to do so denied them a fair trial. The court, following a hearing, denied the motions stating:

"I don't think that the government has the duty to disclose, but even if they had the duty, I don't think it would have made any difference, it was brought out to the jury that Althea Tolliver was paid a thousand dollars by the government and she entered into a plea or bargain for her testimony. It was all brought out to the jury."

The recent decision of the Supreme Court in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) controls our disposition of this issue. The Court there held that the *Brady* rule may apply in three different situations: (1) where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known of the perjury"; (2) where there is a pretrial request for specific evidence; and (3)

⁷ The reward was offered jointly by the Bank of St. Charles and the "Friends of Irwin M. Brown".

where there is no request or simply a general request for "all *Brady* material". With respect to the third category the Court recognized that, "If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor".

The Court in *Agurs* held that, "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 96 S.Ct. at 2400. It was recognized that the courts "cannot consistently treat every nondisclosure as though it were error". The Court continued: "It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless error standard." *Id.* at 2401.

In discussing the "standard of materiality" which gives rise to a duty on the part of a prosecutor "to volunteer exculpatory matter to the defense", the Court said:

"It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance

might be sufficient to create a reasonable doubt." *Id.* at 2401-2402.⁸

This court summarized the *Brady* rule in *Calley v. Callaway*, 519 F.2d 184, 223 (1975) as follows:

"The basic import of *Brady* is not that there is an abstract right on the part of the defendant to obtain all evidence possibly helpful to his case, but rather that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness. As we stated most recently in *United States v. Ramirez*, 5 Cir., 1975, 513 F.2d 72, 78, *Brady* 'rests upon an abhorrence of the concealment of material arguing for innocence by one arguing for guilt.' 513 F.2d at 78."

⁸ See also *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) which falls into the first category established by *Agurs*. The Government there failed to disclose to the defense that the Government's key witness had been promised immunity from prosecution in return for his testimony, despite the statement of the witness on cross-examination that "Nobody told me I wouldn't be prosecuted". In discussing the necessity for disclosure, the Court said:

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra*, [*Napue v. Illinois*, 360 U.S. 264 (1959)] at 269, 79 S.Ct. 1173, 3 L.Ed.2d 317. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict" *United States v. Keogh*, 391 F.2d 138, 148 (CA 2 1968). A finding of materiality of the evidence is required under *Brady, supra*, 373 U.S. at 87, 83 S.Ct. [1194] at 1196. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' *Napue, supra*, 360 U.S. at 271, 79 S.Ct. [1173] at 1178." 405 U.S. at 154, 92 S.Ct. at 766.

The parties stipulated that the reward offer had been published in four newspapers in New Orleans and St. Charles and telecast on a New Orleans station, and that the "Government did not solicit, was not a source of, nor was a party to the offer of reward". It was stipulated further that Althea Tolliver knew of the offer of reward; that attorneys for the Government were aware that she knew of the offer and "hoped to receive same"; and that attorneys for the Government informed the court and defense counsel immediately prior to trial, in response to a defense request for "Brady" material, that there was no *Brady* material. The defense was allowed "open file" discovery by the Government, but no reference to the award was contained in the file.

We question whether the reward offer under the circumstances was the type of "exculpatory evidence" contemplated by *Brady* and subsequent cases. This is not a case where the Government had "exclusive access" to and concealed evidence or information which would exculpate the defendant. The Government was not a party to the reward offer and did not participate in making or obtaining it. The reward offer did not directly exculpate the defendant. At most it cast further doubt on the credibility of Tolliver, admittedly a crucial witness.

In any event, from a review of the entire record, we are satisfied that the "omitted evidence", the reward offer, does not create "a reasonable doubt that did not otherwise exist". Althea Tolliver admitted that her motive for testifying was that she had made a plea bargain in a state case where she was charged with

armed robbery.⁹ She testified that her bond on the charge was reduced from \$200,000 to \$11,000, and that she was ultimately given a suspended sentence on a plea to a lesser charge. Tolliver further testified that she had received "a little over one thousand dollars" from the F.B.I. in return for the information she supplied. There was other testimony that Tolliver was a thief and had been a prostitute. The evidence provided a substantial basis for the impeachment of Tolliver's testimony and was extensively argued to the jury by all counsel. The jury was in a good position to assess Tolliver's credibility. In light of all the evidence, it is unlikely that evidence concerning the offer of reward would have affected the jury's determination of Tolliver's credibility or would have produced a "reasonable doubt" as to Washington's guilt. In the words of *Agurs*, "the mere possibility that [this] item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense".

While we are concerned about the Government counsel's remark in closing argument that Althea Tolliver "has got nothing to gain by coming in here to testify", we do not think it requires a conclusion contrary to the one we reach here. This was an isolated

⁹ Tolliver testified:

"Well when the time came for me to go back to Court and — see, they started putting a lot of pressure on me, which I explained it to them, and I told them that I was — I wouldn't volunteer no information to them no matter what it took, because of fear on my life and because it — of emotional feelings involved, but when a push came to a shove, and I figured that it either had to be my neck or their's, so I volunteered information that I had heard, and this is when they told me that if I volunteered this information for them, that the only deal they could make with me is to let me out on probation, active probation, that I make six thousand dollars restitution back to that jail, which I haven't made."

comment upon which the Government did not elaborate. It was made in the middle of a lengthy argument on Tolliver's credibility and was not prominent in that context.

We conclude that the district court could properly find that the reward offer would not have "made any difference" and that under the criteria of *United States v. Agurs*, *supra*, the reward information was not required to be disclosed by the Government. The motion for a new trial was properly denied.

Affirmed.